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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 477

NOAH BEST, ADMINISTRATOR OF THE ESTATE OF ALBERT EDWARD BEST, DECEASED, PETITIONER,

vs.

DISTRICT OF COLUMBIA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Noah Best, administrator of the estate of Albert Edward Best, deceased, prays that a writ of certiorari be issued to review the judgment entered June 30, 1933, in the Court of Appeals of the District of Columbia in the above entitled cause.

Judgment Below.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel,

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be and the same is hereby, affirmed with costs.

Questions Presented.

1. Upon a given state of facts is a defendant liable for injuries to an infant of five years of age under the doctrine of attractive nuisance?

2. Is the doctrine of attractive nuisance now a part of the law of the Federal courts, particularly the courts of the District of Columbia?

Statement of the Case.

The petitioner, Noah Best, filed suit in the Supreme Court of the District of Columbia for the wrongful death of his minor son. The declaration, among other things, alleged that the respondent, District of Columbia, maintained a wharf which was adjacent to a public street, frequented by many people and children; that it was the duty of the municipality (1) to maintain the wharf and its approaches in a manner that might not be peculiarly attractive to children, (2) to maintain barriers to keep out children of tender years, (3) to keep a safe and proper lookout so that children of tender years would not be allured, invited or enticed to come upon the wharf, (4) to keep the wharf in a safe condition. The declaration then alleges a breach of such duties, causing the death of petitioner's intestate, a child of five years, by drowning. (R. 1-4)

The plea of respondent neither denied that the intestate was playing on the wharf, nor that the age of petitioner's intestate was five years, and was incapable of exercising ordinary care and caution. Under the rules of pleading in the District of Columbia courts, these allegations were

deemed admitted. The plea expressly admitted that the wharf was controlled by the municipality and that it was used for the purpose of storing sand and gravel; it was admitted that the wharf was adjacent to the street. Denial of the other allegations followed, as well as allegations constituting affirmative defenses. (R. 4-5)

Counsel for petitioner made an opening statement and, upon motion by counsel for respondent, the trial court directed a verdict for respondent. (R. 9-10) The Court of Appeals affirmed this action.

The opening statement of counsel is an exact transcription of the stenographer's notes, together with such stenographer's punctuation.

By the opening statement it appears that the deceased and other children were playing on the wharf which extended over the water; the wharf had ten to thirteen holes in it, one of them three feet in diameter; the wharf was adjacent to the street, there being no sidewalk on the street; such wharf was not fenced off, but had some sort of a barrier close to the street, the side portion of which was down and through which the children went in and out at their pleasure, being attracted to the dangerous place maintained by the respondent. (R. 9)

Petitioner complains because the trial court directed a verdict for respondent upon this state of the case.

Rulings of the Courts Below.

The Supreme Court of the District of Columbia directed the jury to return a verdict for respondent, upon the opening statement of counsel for the petitioner, upon the ground that no cause of action had been stated. (R. 9)

The Court of Appeals of the District of Columbia affirmed the action of the trial court. (R. 19-20)

Reasons for Granting the Petition.

By its opinion in this case, the Court of Appeals of the District of Columbia has done away with the common law act based upon the doctrine of attractive nuisance.

The judgment of the Court of Appeals is, therefore, a legislative act rather than a judicial one.

The opinion of the Court of Appeals is in conflict with the following cases:

Cole v. *Penn. R. Co.* (C. C. A. 2), 43 F. (2) 953, 955;

Consol. L. & Z. Co. v. *Corcoran* (C. C. A. 10), 37 F. 296, 297, 298;

So. Pac. Co. v. *Marquez* (C. C. A. 9), 44 F. (2) 286, 287.

The opinions of the various circuit courts of appeal, in the last cited group of cases, and the opinion of the Court of Appeals of the District of Columbia, are in sharp conflict upon this question—Did the Supreme Court of the United States by its opinions in the cases of *United Zinc Co.* v. *Britt,* 258 U. S. 268, and *New York, N. H. & H. R. Co.* v. *Fruchter,* 260 U. S. 141, reverse the cases of *Railroad Co.* v. *Stout,* 17 Wall. 657, and *Union Pac. Ry.* v. *McDonald,* 152 U. S. 262, or did the Supreme Court, by such latter decisions, only narrow and restrict the limits of the attractive nuisance doctrine as stated in the earlier cases?

Question 1.

The facts, as admitted in the pleading and as set forth in the opening statement, make out a case to be submitted to a jury under the opinions of the Supreme Court in the Stout and McDonald cases, *supra,* and under the opinion of the Circuit Court of Appeals for the 6th Circuit in the case of *American Ry. Exp. Co.* v. *Crabtree,* 271 F. 287, 288.

Question 2.

If the opinions of the Supreme Court in the Britt and Fruchter cases, *supra,* are held to be a modification or limitation of, and not a reversal of, the theory of the doctrine of attractive nuisance as announced by the Supreme Court in the Stout and McDonald cases, the trial court should have submitted the case to the jury.

The Court of Appeals of the District of Columbia, in this case, held that the Supreme Court, in the Britt and Fruchter cases, overruled the doctrine of attractive nuisance as announced in the Stout and McDonald cases.

The Circuit Courts of Appeal for the 2d, 9th and 10th Circuits have held that the Supreme Court did not overrule such doctrine, but modified and limited it.

Cole v. *Penn. R. Co.* (C. C. A. 2), 43 F. (2) 953, 955;
Consol. L. & Z. Co. v. *Corcoran* (C. C. A. 10), 37 F. (2) 296, 297, 298;
So. Pac. Co. v. *Marquez* (C. C. A. 9), 44 F. (2) 286, 287.

In the above opinions of the Circuit Courts of Appeal, the opinion of the Supreme Court in the Britt and Fruchter cases was distinguished from the opinions in the Stout and McDonald cases. In those circuits the doctrine of attractive nuisance is still applicable when cautiously applied. The Court of Appeals of the District of Columbia held that the doctrine was inapplicable in any case.

Conclusion.

Wherefore, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Court of Appeals of the District of Columbia commanding that court to certify and to send to this Court for its review and de-

termination on a day certain to be therein named, a full and complete transcript of the record and all of the proceedings in case numbered 5768, and entitled on its docket "*Noah Best, Administrator of the estate of Albert Edward Best, deceased,* v. *District of Columbia,*" and that the said judgment of the Court of Appeals of the District of Columbia may be reversed and for such other and further relief as to the Court may seem meet and proper.

NOAH BEST,
Administrator of the Estate of
Albert Edward Best, Deceased,
By JAMES A. O'SHEA,
JOHN H. BURNETT,
ALBERT GOLDSTEIN,
Washington, D. C.,
Attorneys for Petitioner.

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vs.

DISTRICT OF COLUMBIA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION.

Opinion.

The majority opinion and the dissenting opinion (Groner, J.) of the Court of Appeals of the District of Columbia (Chief Justice Martin, Associate Justices Robb, Van Orsdel, Hitz and Groner) were filed June 30, 1933, and appear at pages 11 to 18 of the Record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (A) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938, 28 U. S. C., Sec. 347). The judgment of the Court of Appeals of the District of Columbia was entered June 30, 1933. This petition was filed September 23, 1933.

Noah Best, as administrator of the estate of his deceased son, Albert Edward Best, filed suit in the Supreme Court

of the District of Columbia as provided in the Code of said District (Tit. 21, Secs. 1-3) for the wrongful death of said son. Noah Best is the petitioner herein, and the defendant in the trial court, the District of Columbia, is respondent.

The action in the lower court was based upon the doctrine of attractive nuisance. By the admissions in the pleadings and the opening statement of counsel for the petitioner, it appears that the respondent operated and controlled a sand wharf in the District of Columbia. Children were accustomed to going into this place where sand and gravel were stored. The wharf was immediately next to the street and the children were in the habit of going to and from the wharf at places where there was no barrier or fence. The child who was drowned was five years of age, and was playing on the sand wharf with other children just before he fell through the wharf. The trial court, after counsel for petitioner had made his opening statement, refused to submit the case to the jury and directed said jury to return a verdict for the respondent on the ground that no cause of action against respondent had been stated.

The Court of Appeals of the District of Columbia affirmed the action of the trial court.

The law upon the record in this case, as stated by the Court of Appeals of the District of Columbia, is not in harmony with the law as stated by the Supreme Court of the United States and the Circuit Courts of Appeal for the 2d, 6th, 9th and 10th Circuits.

The Facts.

The facts are stated in the petition, pages 2 and 3.

ARGUMENT.

The argument will follow the order of the title "Questions Presented."

(1)

Upon a given state of facts is a defendant liable for injuries to an infant under the doctrine of attractive nuisance?

The doctrine of attractive nuisance was clearly stated in *Union Pac. Ry. Co.* v. *McDonald,* 152 U. S. 262; the court said, p. 279:

> "We adhere to the principles announced in *Railroad Co.* v. *Stout, supra.* Applied to the case now before us, they require us to hold that the defendant was guilty of negligence in leaving unguarded the slack pit, made by it in the vicinity of its depot building. It could have forbidden all persons from coming to its coal mine for purposes merely of curiosity and pleasure. But it did not do so. On the contrary, it permitted all, without regard to age, to visit its mine, and witness its operation. It knew that the usual approach to the mine was by a narrow path skirting its slack pit, close to its depot building, at which the people of the village, old and young, would often assemble. It knew that children were in the habit of frequenting that locality and playing around the shaft-house in the immediate vicinity of the slack pit. The slightest regard for the safety of these children would have suggested that they were in danger from being so near a pit, beneath the surface of which was concealed (except when snow, wind or rain prevailed) a mass of burning coals into which a child might accidentally fall and be burned to death. Under all the circumstances, the railroad company ought not to be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser, to whom it owed no duty, or for whose protection it was under no obligation to make provision * * *."

(p. 280):

> "Referring to the case of *Townsend* v. *Wathen*, Judge Thompson in his work on the Law of Negligence, Vol. 1, p. 305 n., well says: 'It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life.' Indeed, the present case is stronger than the one supposed by the writer, in that the defendant was aware of the fact that children often visited its mine."

In *United Zinc Co.* v. *Britt*, 258 U. S. 268, the court stated that the reason for the rule there laid down was because there was no evidence (1) that the children could see the attractive nuisance from where they lawfully were; (2) that such sight attracted them to the nuisance. The court said, p. 275:

> "In the case at bar it is at least doubtful whether the water could be seen from any place where the children lawfully were and there is no evidence that it was what led them to enter the land. But that is necessary to start the supposed duty."

At page 276 of the opinion, the court pointed out that the facts failed to show that it was the habit of the children to go to the place of the nuisance. The court said:

> "* * * It does not appear that the children were in the habit of going to the place; so that foundation also fails."

In the opening statement in the case at bar, counsel said that the place of the nuisance was right off of the street,

on which there was no sidewalk, and the same was maintained by the District as an attractive nuisance; that the side portion of the barrier at the street was down, and that the children used the place to play on and went in and out at their pleasure. (R. 9)

All three of the exceptions to the rule laid down in the Britt case were met. That case does not govern the case at bar, because the facts were different from the case at bar.

The present action was based upon two sets of facts (1) showing that the children lawfully in the street could see the attractive nuisance because the barrier thereto was down and the same was maintained by defendant and attracted the children there; and (2) the children were in the habit of playing at that place. (R. 9)

The case of *New York, N. H. & H. R. Co.* v. *Fruchter,* 260 U. S. 141, the child was injured by an unguarded electric wire after climbing a pole 29 feet in height in order to reach a pigeon's nest. That case is not in point. The Circuit Court of Appeals for the 2d Circuit so states.

In *Cole* v. *Penn. R. Co.* (C. C. A. 2) 43 F. (2) 953, 955, the court stated that the reason for the doctrine announced in the Fruchter case was:

> "* * * on the ground * * * that the doctrine laid down in the *Railroad Co.* v. *Stout,* 17 Wall. 657, and *Union Pacific Ry. Co.* v. *McDonald,* 152 U. S. 262, did not cover the facts presented."

In the case of *Am. Ry. Exp. Co.* v. *Crabtree* (C. C. A. 6) 271 F. 287, 288, the court held that the question of negligence in an action by an administrator for the death of an infant, which action is based upon the doctrine of attractive nuisance, was a question of negligence which must be submitted to a jury.

QUESTION 2.

Is the doctrine of attractive nuisance now a part of the law of the Federal courts, particularly the courts of the District of Columbia?

In the Britt case, the children were 8 and 11 years old, the nuisance was 100 to 120 feet from where the children were. The children in that case and in the Fruchter case had to seek out the nuisance. The case at bar does not come within those facts.

The majority opinion in the Britt case does not expressly reverse the turntable doctrine. To the contrary the court said, p. 275:

> "* * * But the (turntable) principle if accepted must be cautiously applied."

We must determine whether the Britt and Fruchter cases reverse the Stout case, by implication. Various courts have held that they do not.

In *Consolidated Lead & Zinc Co.* v. *Corcoran* (C. C. A. 10) 37 F. (2) 296, an attractive nuisance case, the court reversed the case because of the instructions to the jury, but announced the law of the case to govern the second trial. The nuisance was "near and in plain view of the road" (p. 296), "the children were in the habit of playing about the nuisance" (p. 296). In speaking of the effect of the opinion in the Britt case, the court said, p. 297:

> "* * * That case distinguished *Railroad Co.* v. *Stout*, 17 Wall. 657 * * * and *Union Pacific Railway* v. *McDonald*, 152 U. S. 262 * * *. Both of those cases are more nearly applicable here. The Britt case was essentially different in the facts, which were held not to impose the duty of care. The court said: 'There can be no general duty on the part of the

landowner to keep his land safe for children, or even free from hidden dangers,' but was careful to add, 'if he had not directly or by implication invited or licensed them to come there.' The case (*Zinco Co.* v. *Britt*) is obviously not in point."

The court then held that the facts alleged in the declaration were proved and that the motion to direct a verdict for defendant was properly overruled. P. 298 of the opinion:

"'But it is alleged in this case that habitual use as a playground had been made of the premises and transformer house, as the company knew or might easily have known, and in that situation the plaintiff was a licensee, and being there as such, with the acquiescence of the company, it owed him the duty of protection against danger in the transformer house known to the company, to which he might be attracted and to which it might reasonably anticipate he would resort and be injured. (Citing cases) * * *

"The motion to direct a verdict was not well founded, as the evidence fully substantiated the averments of the petition. We note the more prominent facts the evidence proved or tended to prove at the trial."

In *So. Pac. Co.* v. *Marquez* (C. C. A. 9), 44 F. (2d) 286, the plaintiff was a boy of 10 years who was injured while playing on an unguarded turntable, which was easily unlocked, and about which children has been in the habit of playing. Judgment was entered for plaintiff and defendant appealed. The case was affirmed. The court pointed out, p. 286:

"* * * The principal assignment of error is based on the refusal of the court to direct a verdict for the appellant (defendant below) at the close of the evidence."

The court considered the Britt case and the Fruchter case but pointed to the words of Mr. Justice Holmes in

the Britt case ("But the turntable principle if accepted must be very cautiously applied.") as meaning that the turntable doctrine as stated in the Stout case was still applicable to proper facts. The court said, p. 287:

> "Counsel for appellant seems to concede that the issues were properly submitted to the jury under the authority of the Stout and McDonald cases, but earnestly insists that these cases were overruled by the Britt case and by *New York, N. H. & H. R. Co.* v. *Fruchter,* 260 U. S. 141, 43 S. Ct. 38, 67 L. Ed. 173. We cannot agree with the latter contention. In the Britt and Fruchter cases the court simply refused to apply the doctrine of the turntable cases to a pond of poisoned water or to electric wires strung twenty-nine feet above the street. The most than can be claimed in that behalf is that the court has declared that the principle involved should be applied with caution, and that the doctrine of the turntable cases should be restricted rather than extended. Further than this the court has never held that a recovery should not be permitted on facts similar to those presented here."

In the case at bar, the child was five years of age; a sand pile, which was to be seen from the street, was unfenced and in a place open to whomsoever chose to enter. The children had been allowed to play about the place. Defendant had permitted them so to do. This was a place where boats docked. Surely, then, it was, as Mr. Justice Holmes said in the Britt case, "something that was certain to attract" a child of 5 years of age, the very age when he would follow "a bait as mechanically as a fish."

Every fact stated in the opening statement was by the motion conceded as true.

The opinions of the Supreme Court and these Circuit Courts of Appeal are in conflict with the case of *Brannan* v. *Wimsatt,* 54 App. D. C. 374, and the opinion in the present case. In the case of *Brannan* v. *Wimsatt, supra,* the Court

of Appeals of the District of Columbia held that the opinion of the Supreme Court in the Britt case wiped out the doctrine of attractive nuisance and that it was no longer basis for an action for negligence in the courts of the District of Columbia.

Conclusion.

Wherefore, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of the District of Columbia, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all of the proceedings in the case numbered 5768, and entitled on its docket, "*Noah Best, Administrator of the Estate of Albert Edward Best, deceased,* v. *District of Columbia,*" and that the said judgment of the Court of Appeals of the District of Columbia may be reversed, and for such other and further relief as to the Court may seem meet and proper.

NOAH BEST,
Administrator of the Estate of Albert Edward Best, Deceased.
By JAMES A. O'SHEA,
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